No. 142.

Brief of Williams for D. C.

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BRIEF FOR DEFENDANT IN ERROR.

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**Robert G. Wilson**, Plaintiff in Error,

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IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

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ROBERT G. WILSON, PLAINTIFF IN ERROR,
vs.
EUREKA CITY, DEFENDANT IN ERROR.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

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## BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in error was convicted in the District Court of Juab County, State of Utah, of a violation of an ordinance of Eureka City, which reads as follows:

"No person shall move any building or frame of any building into or upon any of the public streets, lots or squares of the City or cause the same to be upon or other-

wise to obstruct the free passing of the streets, without the written permission of the Mayor or President of the City Council or, in their absence, a councilor. A violation of this section shall on conviction, subject the offender to a fine of not to exceed $25.00."

It is claimed by the plaintiff in error that this ordinance is invalid, because thereby the citizen is deprived of his property without due process of law and is denied the equal protection of the laws and that the ordinance is repugnant to Section 1 of Article XIV of the amendments to the Constitution of the United States and therefore void. The charter power of the City is as follows: To regulate the use of streets, alleys, avenues, sidewalks, cross-walks, parks and public grounds (1 Comp. Laws Utah, 1888, p. 621, Subd. 10). To prevent and remove any obstructions and encroachments on the same (subd. 11). To regulate and prohibit the throwing and depositing of ashes, etc., and prevent injury or obstruction to any street, avenue, alley, park or public ground (id. p. 623, subd. 22),

## I.

THE STREETS OF THE CITY ARE PRIMARILY UNDER THE CONTROL OF THE LEGISLATURE. THERE IS NO PROOF THAT PLAINTIFF IN ERROR HAD ANY SPECIAL RIGHT THEREIN. THE USE OF A STREET FOR MOVING A HOUSE IS NOT AN ORDINARY USE AND UNLESS EXCEPTIONAL CIRCUM-

STANCES APPEAR SUCH USE WOULD BE A NUISANCE AT COMMON LAW.

The defendant complains that by the ordinance in question he is forbidden to exercise a natural and ordinary right; that permission having been refused by the Mayor, he would have a natural right to move his house upon the street in question. There is no evidence in the record that it was usual or customary to use the street in question for the purpose of moving houses. In the absence of any ordinance and in the absence of such proof the authorities seem to be to the effect that to move a house upon a street in a city is a nuisance which may be abated summarily or by application to a Court of Equity.

In Williams v. Citizens Railway Co. (Ind.) 30 Am. St. Rep. 205, it appeared that the defendant was attempting to move a house along Main Street in the City of Elkhart, and was interfering with the operation of the street railway belonging to the appellee. An action was brought to restrain the moving of the house and an injunction issued. Upon the appeal the Supreme Court of Indiana said:

> "The appellants in this case are not asking to be allowed to make an ordinary use of the streets of the city; they are, on the contrary, asking that they be permitted to use the streets in an extraordinary mode and for an unusual purpose." (Citing authorities.) "That the demand in this case is an extraordinary one is shown by the authorities to which we have here referred; but it may be made more plain by simply saying that the purpose for which highways are laid out and dedicated is that of travel in the usual

> modes. It would be strange indeed if large buildings could be moved along the streets of a city without control or restriction, and it would be equally strange if the owner of a building could destroy the property of others in order to enable him to move his building from one place to another."

In the case of Day v. Green, et al, 4 Cush. 433, the Supreme Judicial Court of Massachusetts uses this language:

> "That it is often useful and convenient that buildings should be so removed is found by experience. It may often be done with little or no inconvenience to the public under suitable and proper restrictions adapted to each particular case and therefore *it seems highly proper that the power to authorize and regulate it should exist somewhere.* (Our italics). Perhaps the power vested in municipal corporations to make salutary by-laws for the regulation of the highways is sufficient for this purpose."

In Graves v. Shattuck (N. H.) 69 Am. Dec. 536, the Supreme Court of New Hampshire said:

> "If public highways in Nashua and similar localities had been commonly used for the purpose of moving buildings the plaintiff was guilty of no nuisance in moving his building through them, provided he selected suitable streets, used proper expedition and was in the reasonable use of such streets under all the circumstances shown in evidence, causing no unnecessary obstruction therein."

It would seem therefore that in the absence of any ordinance on the subject, it would be necessary for the defendant to show that it was usual and customary to use streets of the City in question for the purpose of moving houses before he could claim any such right.

## II.

## THERE WAS AMPLE GROUND FOR THE REFUSAL TO GRANT THE PERMISSION IN THIS PARTICULAR CASE.

The defendant expressly declared to the Mayor in applying for permission that he expected to violate another ordinance of the City, viz. that with reference to the fire limits. The building in question was a frame building and was to be set up within the fire limits. The ordinance forbade the erection of this character of buildings within the fire limits. That the removal of a building from one place to another within the fire limits is within such prohibition see Wadley v. Gilman, 12 Me. 403.

Eureka City v. Wilson, 15 Utah, 67, 76.

## III.

## THE ORDINANCE IN QUESTION IS VALID BOTH UNDER THE EXPRESS POWER CONFERRED UPON THE CITY AND AS AN EXERCISE OF ITS GENERAL POLICE POWER.

Under the provisions of the Compiled Laws of Utah, 1888, already quoted, it will be seen that the City has the power to regulate the use of streets and to prevent injury, obstructions and encroachments to and upon them. The extent of the power having been defined, the municipality is the sole judge of the manner in which it shall be exercised.

State vs. Yopp, 2 Am. St Rep., 305.

White vs. Kent, 11 O. St., 550.

It would seem to require no argument to show that an ordinance which forbids the moving of houses upon the streets of a city is not only valid but highly necessary. Under the authority conferred by the legislature upon the council to regulate the use of streets, to prevent obstructions and encroachments upon them, the council is given plenary power.

Wood vs. Mears, (Ind.) 74 Am. Dec., 222.

It may prohibit the running of hogs upon the streets.

Roberts vs. Ogle, 83 Am. Dec., 201.

It may forbid the beating of drums upon the streets without a special permit from the president of the board of trustees.

In re Flaherty, 105 Cal., 558.

In the case of Commonwealth vs. Curtis, 9 Allen, 266, it was held that an ordinance prohibiting swine going upon any sidewalk in the city so as to interfere with the convenient use of the same was within the power of the city under the general welfare clause.

In the case of Pedrick vs. Bailey, 12 Gray, 161, it was held that an ordinance providing that no person should maintain an awning before his door without the consent of the mayor and aldermen constituting a part of the city council, was within the power of the city.

In Commonwealth vs Plaisted, 2 L. R. A., 142, it was held that a rule of the Boston Board of Police prohibiting any person playing a musical instrument in the streets or public places in the city except in certain

cases, unless licensed by the board of police was within the power of the city.

In the case of Commonwealth vs. Abrahams, 156 Mass., 57, the ordinance prohibited the making of orations in the public parks of Boston without the prior consent of the board of park commissioners. The secretary of the Central Labor Union requested permission to hold a public meeting in Franklin Park on July 4th. Permission was not given. Defendant did make a brief oration in a portion of the park in which no considerable number of the people were gathered; no shrubbery or ornamental trees were ruined; his subject was the right of citizens to assemble peaceably and to debate social questions. The oration was delivered in an ordinary oratorical tone and was applauded by hand clapping at the close. The audience quietly dispersed and no injury was done the park. Defendant was found guilty and appealed. The Supreme Court said:

> "The parks of Boston are designated for the use of the public generally and whether any park or a part of any park can be temporarily set aside for the use of a portion of the public is for the park commissioners to decide in the exercise of their discretion."

In the case of Day vs. Green, supra, the Court held that where an ordinance of the City of Cambridge prohibited the removal of buildings in the streets except by license granted by the mayor and aldermen, it was unlawful for any person to move a building in the streets of the city upon the license of the mayor alone.

There was a query in the case as to whether or not the corporation could authorize the temporary total obstruction of the highway. The court suggests that it might be highly proper that the power to authorize and regulate it should exist somewhere.

In the case of Lowell vs. Simpson, 10 Allen, 88, an ordinance probibited the obstruction of any street for the purpose of building, without obtaining written license from the mayor and aldermen, or some person authorized by them. The court held that the mayor alone had no authority to grant the license, and that any agreement made in consideration of the mayor's license alone, to indemnify the city against damages, was without consideration and void.

## IV.

## THE POWER CONFERRED ON THE MAYOR IS NOT A DELEGATION OF LEGISLATIVE POWER BUT IS ONE OF ADMINISTRATIVE POWER AND SHOULD BE UPHELD.

The distinction between what may and what may not be delegated by a governing body to its agencies is very well settled. Nothing is more common than to leave a discretion to an officer or agent of a municipality.

A very usual ordinance is to prohibit carrying concealed weapons without the permission of the mayor. Such ordinances are upheld, although they vest in the mayor power to set aside the prohibition in individual cases.

In the case of Downing v. Insurance Co., (Wis.) 31 L.

R. A., 112 at page 124, the authorities are reviewed, and quoting from Moers. vs. Reading, 21 Pa. 202, it is said:

> "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the occasion exists for executing it; but it cannot be said that the exercise of such discretion is the making of the law."

And quoting from Locke's appeal, 72 Pa., 491, 498, it is said:

> "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.

See also Field vs. Clark, 143 U. S. 69, where this Court held that the power conferred on the President of the United States by the McKinley bill to suspend the free introduction of certain articles from certain countries unless a reciprocity treaty should be made was not an unlawful delegation of power. The power conferred upon the mayor by the ordinance in question is wholly administrative and not legislative.

The ordinance declares that buildings shall not be moved upon the streets of the City, but in the administration of this statute it was recognized that occasions might arise where individual hardship would result without corresponding benefit to the public and in such cases a discretion is vested in the mayor to suspend the operation of the law. Such provisions are upheld we believe by the great weight of authority.

## V.

THE ORDINANCE IS NOT INVALID IN CONFERRING POWER ON THE MAYOR TO GRANT PERMISSION TO MOVE BUILDINGS UPON THE STREETS, BECAUSE WHAT MAY BE FORBIDDEN ABSOLUTELY MAY BE FORBIDDEN CONDITIONALLY.

In Davis vs. Mass. 167 U. S. 43, 48, this Court, in determining a similar question, said:

> "The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."

See also the following cases:

In re Flaherty, 105 Cal. 558.

Commonwealth vs. Parks, 155 Mass. 532.

Commonwealth vs. Ellis, 158 Mass. 555.

Quincy vs. Kennard, 151 Mass. 563.

Commonwealth vs. Davis, 162 Mass. 510.

Lowell vs. Simpson, 10 Allen, 88.

Day vs. Green, 4 Cush. 433.

Commonwealth vs. Abrahams, 156 Mass. 57.

Easton vs. Covey, (Md.) 22 At. Rep. 266.

Pedrick vs. Bailey, 12 Gray, 161.

Welch vs. Hotchkiss, 12 Am. Rep. 383.

Child vs. Bemus, 12 L. R. A. 57.

## VI.

THE ORDINANCE IN QUESTION IS NOT IN CONFLICT WITH THE FIRST SECTION OF THE

## XIVTH AMENDMENT TO THE FEDERAL CONSTITUTION OR OF ANY OTHER PROVISION OF THE CONSTITUTION.

If the power to forbid the moving of houses upon the streets of a city either absolutely or conditionally is within the police power of the State of Utah, as we understand the decision of this Court, the question as to whether or not the plaintiff in error has been deprived of any right under the federal constitution must be answered in the negative.

In the case of Davis vs. Mass., supra, this Court, passing upon a question identical in principle with that presented here, said:

> "It is, therefore, conclusively determined there was no right in the plaintiff in error to use the common, except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe. The XIVth. amendment to the Constitution of the United States does not destroy the power of the States to enact police regulations as to the subjects within their control. (Citing authorities). And does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the Constitution and laws of the State."

In Minneapolis Railway Co. vs. Beckwith, 129 U. S., 29, this Court said:

> "But the clause does not limit nor was it designed to limit the subjects upon which the police power of the State may be exerted. The State can now, as before, prescribe regulations for the health, good order and safety of society and adopt such measures as will advance its interests and prosperity."

In Barbier vs. Connolly, 113 U. S., 31, this language is used.

> "But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity."

In Jones vs. Brim, 165 U. S. 180, this Court, after holding that the clause of the 14th amendment in question was intended to prohibit an arbitrary deprivation of life or liberty or arbitrary spoliation of property, said:

> "But it does not limit, nor was it designed to limit, the subjects upon which the police power of a state may be lawfully exerted."

Most of the cases which will be relied upon by counsel for defendant are cases which are readily distinguishable from the one at bar. The point of distinction is this: In those cases the ordinance undertook to forbid the doing, without permission, of things which were not only generally lawful in themselves, but were absolute rights. In this case the ordinance forbids the doing of a thing which may or may not be lawful, but permits the mayor to set aside the prohibition in individual cases. The council have the right under the charter power to forbid absolutely the moving of buildings upon the streets. If the ordinance had been passed without the qualification, then the defendant in this case under no condition could have moved the

building in question. How is he injured, or how is any citizen injured or deprived of any right, if in addition to being forbidden to move a building the possibility is presented to him and to any other citizen of having the prohibition removed in any particular case?

A large number of the cases relied upon grew out of the attempt to interfere with the parades of the Salvation Army.

It was held and we think rightfully, that this was class legislation; at any rate those cases are clearly distinguishable from the case at bar. Ordinances similar to the one in question have been repeatedly upheld by the Courts. The vesting of a discretion in an officer to grant permits is valid; what may be forbidden absolutely may be conditionally.

We refer the court to a few of the decided cases which are most directly in point.

In the case of Flaherty, 105 Cal. 558 an ordinance forbade the beating of drums in the traveled streets of the city without the permission of the president of the board of trustees. The ordinance was held valid by a majority of the court. Numerous authorities are cited in that case and we invite the court's special attention to it.

The court said:

> "It is contended that the clause authorizing a permit is partial and oppressive because it gives too much power to the president of the board, and is violative of general constitutional principles against abridging the privileges of citizens, depriving a person of his

rights without due process of law, denying him the equal protection of the law, etc.

"The continuous and daily beating of drums on the streets of a city would be an intolerable nuisance, endangering the safety of teams and the occupants of vehicles drawn by animals, as well as of pedestrians liable to be injured by runaways; and stunning the ears with din so constant as to be almost insufferable. On the other hand, there is usually no objection to such noises on a few occasions, either when there are patriotic celebrations generally participated in by all the people, or processions of a part of the people united in civic societies, political parties, etc. These occasions are comparatively few and usually well known, so that the people are prepared for them; and the processions and drums are generally preceeded by policemen who give notice of the approaching uproar. But how can these occasions be provided for? By an ordinance which shall anticipate and state in detail before-hand every occasion on which the noises may be made? Such a thing is practically impossible. No human being could conjure up all the circumstances under which the people might want a band (with a drum) on the streets. It would not do to name legal holidays alone; that, for obvious reasons, would be too narrow a provision. Neither would it do to single out, in addition to holidays, certain enumerated days, as for instance, the first Monday in every month; the President of the United States or some other distinguished man whose advent should be celebrated with drums might come on Tuesday. Neither would it be possible to schedule the kinds or characters of occasions of which drums would be a necessary part, and so the practical result of petitioner's contention is that all persons must be allowed to beat drums on all occasions as they may choose, or no person must be allowed to beat a drum on any occasion whatever.

"In dealing with this and similar questions, such as repairs

> of wooden buildings within fire limits, carrying concealed weapons, using public buildings and grounds, ringing bells on buildings where many operatives are employed, haranguing on the streets by lecturers, preachers, etc., singing or playing on musical instruments on the streets, and the like—our federal, state and municipal governments have always recognized the practical impossibility of providing in advance for proper exceptional cases, and the necessity of giving to a public officer some discretion in the premises; and laws and ordinances based on that principle have nearly always been upheld when subjected to judicial test. Laws are not made upon the theory of total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villianously and for purposes of oppression and mischief. Of course it is impossible to state in terms the extent or the limitation of what is known as the police power; and courts have not attempted to do it. Whether or not that power has been exceeded in particular cases must be determined as the cases arise; and, to find the law applicable to a particular case, we must look to see what courts have held in similar cases. And we find that statutes and ordinances similar in character to the one in question in the case at bar have been sustained in most of the cases to which our attention has been called."

The Court then proceeds to cite and discuss numerous cases, some of which we refer to and upon all of which we rely.

The cases which will be relied upon by appellant here, were before the Court in this case. See Brief for Petitioner, p. 558-9.

In Ex parte Fiske, 72 Cal. 125, the ordinance provided that no wooden building could be erected within

the fire limits without permission in writing signed by a majority of the fire wardens, etc. The California Court held that it was valid. Discussing the question here involved, at page 127, the Court said:

> "And it is equally clear that no general rule could be established before hand that would meet the emergencies of individual cases. Therefore, the power to give relief in particular instances is conferred on certain officers, and it is not to be presumed that they will exercise it wantonly or for purposes of profit or oppression. Neither is the granting of permits in particular instances to be considered as a taking away of any rights from those to whom such permissions are not given. The latter would be in no better position if such permits were given to none or if there was no power to give them at all."

In this case the authorities are reviewed and the case of Yick Wo vs. Hopkins, 118 U. S. 356, which is relied upon by appellant, is distinguished from the ordinance in question. We invite the especial attention of the Court to this case. Also in the case of Crowley vs. Christensen, 137 U. S., page 86, the distinction contended for is pointed out, and the case of Yick Wo vs. Hopkins is distinguished.

Commenting upon that case, this Court says:

> "It will thus be seen that that case was essentially different from the one now under consideration, the ordinance there held invalid vesting uncontroled discretion in the board of supervisors with reference to a business harmless in itself and useful to the community; and the discretion appearing to have been exercised for the express purpose of depriving the petitioner of a privilege that was extended to others. In the present case the business is not one that any person is permitted to carry on without a license but

> one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe."

In Commissioners of Easton vs. Covey, (Md.) 22 At. Rep., 266, an ordinance forbidding the erection of buildings without the permission of the commissioners through their clerk was held valid.

In Welch vs. Hotchkiss, (Conn.) 12 Am. Rep., 383, where the municipality had been authorized by its charter to make by-laws regulating the erection of buildings, a by-law requiring a permit and payment of license fee before erecting a building, was held to be valid.

In the case of State vs. Tenant, 28 Am. St. Rep. 715, the distinction contended for is very clearly pointed out by the Court, and it is held that the legislature may restrict an individual in the exercise of dominion or control over his own house and premises AS MAY RESULT IN INJURY TO OTHERS, provided the law does not upon its face discriminate in favor of one person or class, and the legislature may delegate such power to municipal corporations, but that this cannot be done where the right of dominion of an individual which he might otherwise exercise without question, is restricted.

Referring to the case of State vs. Yopp, the Court says, at page 719:

> "While the legislature has no right to enact a law forbidding all men in a certain section from building houses of any kind on their own land, it unquestionably is empowered to forbid riding bicycles on a particular road or street altogether, because the lives of other

> persons and the safety of the property of others are imperiled by their use, on account of the danger of frightening horses attached to vehicles. *Sic utere tuo ut non alienum laedas.* Having power to prohibit using bicycles on the road entirely, the legislature had the power to authorize a person or tribunal to grant a license, when the road should be clear of vehicles, that it has to provide for the licensing the sale of spirituous liquors."

This points out the distinction in very clear and emphatic terms.

In the case of Pedrich et al. vs. Bailey et al., 12 Gray, 161, an ordinance providing that no person should maintain an awning before his door without the consent of the mayor and aldermen, was held valid.

In Commonwealth vs. Parks, 155 Mass. 532, the Court says, with reference to an ordinance prohibiting blasting in the city without the written consent of the aldermen who were only a part of the city council:

> "Furthermore, what the municipal body may forbid altogether, it may forbid conditionally unless this written permission is obtained before hand; nor do we think it matters that the permission required is that of the alderman and not of the whole city council."

In Quincy vs. Kennard, 151 Mass, 563, an ordinance forbade keeping swine within the town without a permit in writing from the board of health. The court held it valid, saying:

> "It is admitted that the board of health had authority to forbid the exercise of the employment of keeping swine in the town of Quincy, but is argued that the order passed was invalid because the prohibition contained in it was qualified by the words 'without a permit in writing first obtained from the board of health.' We are at a loss to see how it affects the validity of the

> order that the board expressly reserved to themselves the power to do what they could have done even if the prohibition had been absolute, or how the defendants are put in a worse position by the order contemplating the possibility that the board of health may grant them a written permit, than if it had excluded that possibility."

In Commonwealth v. Ellis, 158 Mass., 555, where an order forbade selling in the street any goods except on a permit from the superintendent of streets, the ordinance was held reasonable, constitutional and valid; the Court said:

> "We are of opinion, both on principle and authority, that the city council may lawfully forbid public selling in the streets. (Citing numerous cases.) This being so, the ordinance is none the worse for the exception in case of permit from the superintendent of streets." (Citation of authorities.)

In Commonwealth v. Davis, 162 Mass., 510, where an ordinance forbiding the making of a public address without a permit from the mayor, was held valid, the Court said:

> "It is settled also that the prohibition in such an ordinance which would be binding if absolute, is not made invalid by the fact that it may be removed in a particular case by a license from a city officer or a less numerous body than the one which enacts the prohibition."

And this holding of the Supreme Court of Massachusetts is followed by this Court in the case already referred to, 167 U. S. p. 43.

In the case of State v. Yopp (N. C.) 2 Am. St. Rep. 305, the Court held the law providing that bicycles

should not be used upon certain roads without the permission of the superintendent of the road, valid, saying:

> "It is further objected that the statute leaves it to the arbitrary discretion of the superintendent of the road named to allow or disallow persons to use 'a bicycle, tricycle or other non-horse vehicle,' on it. This is a misapprehension of the true import of the provision cited. The discretion vested in the superintendent is not arbitrary. He is made the agent of the law, as well as superintendent, and he is bound to exercise the discretion vested in him honestly, fairly, reasonably, and without prejudice or partiality, for the just purpose of effectuating the intention of the statute * * * * The authority is not his; he is simply made the agent of the law for a lawful purpose, and he is amenable as such for any prostitution of the power so vested in him, and the creation of the discretion implies that there may be occasions or times or seasons when bicycles may be used on the road."

We also refer to the following cases:

Commonwealth vs. Abrahams, Supra;

18 Am. & Eng. Ency. Law, page 747;

96 U. S., 529.

Lowell vs. Simpson, Supra;

Tate vs. Greenboro, (N. C.) 24 L. R. A., 671;

Rodwick vs. Wheeler, 51 Hun., 620;

State vs. White, 64 N. H., 48;

People vs. Mulholland, 82 N. Y., 324.

It is therefore submitted that the decision of the Supreme Court of Utah should be affirmed.

P. L. WILLIAMS,

ATTORNEY FOR DEFENDANT IN ERROR.